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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CARL EDWARD LANE, Appellant.	)	2 CA-CR 2010-0162 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20072360

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED AS MODIFIED

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H O W A R D, Chief Judge.

¶1 Appellant Carl Lane was convicted after a jury trial of continuous sexual abuse of a child under the age of twelve, commercial sexual exploitation of a minor under the age of twelve, sexual exploitation of a minor under the age of fifteen, and sexual conduct with a minor under fifteen. In Lane's first appeal to this court, we vacated the conviction and sentence on the charge of commercial sexual exploitation of a minor, agreeing with Lane there was insufficient evidence to sustain the conviction. *State v. Lane*, No. 2 CA-CR 2008-0283, ¶ 5 (memorandum decision filed Aug. 13, 2009). We also vacated the remaining sentences, finding they had been enhanced improperly with two prior felony convictions rather than one and remanded the case to the trial court for resentencing. *Id*. ¶ 6. In this appeal following Lane's resentencing, he challenges the amount of restitution he was ordered to pay to the victim. We affirm the restitution order as modified, for the reasons stated below.

¶2 At Lane's first sentencing hearing in August 2008, he objected to $13,423.81 the state was requesting in restitution on behalf of the victim for the loss of her property, arguing the losses claimed were "not recoverable as a result of this incident." Defense counsel conceded $488.30 in lost wages was a proper award, but not the remaining amount, which the state characterized as "liquidation of absolutely every one of the possessions she's ever had." The property had belonged to the victim and apparently had been left by her at the house where she had lived with Lane. According to the prosecutor, Lane had "liquidated or sold everything that she possessed." Addressing the court with respect to restitution, the victim, then nineteen years old, explained she had "worked for everything [she] ha[d] ever bought" and "had it all taken away from [her] for a charge that someone did against me." Defense counsel maintained she had abandoned the property and that he did not know what had happened to it; he asserted she had ample

time both before and after Lane was arrested to retrieve her property, had not done so, and the house had since been sold.

¶3 The court awarded the amount requested over Lane's objection, and he did not challenge the restitution order in his first appeal. At the May 10, 2010 resentencing, however, Lane addressed the court with respect to restitution, stating he believed he could not be ordered to pay the value of the property because it was not lost as a result of the offenses of which he had been convicted. He also maintained the victim had the opportunity to recover the property from his home and failing to do so thereby had abandoned it. The trial court responded, "Pursuant to the opinion of the Court of Appeals, Count 2, the sentence on commercial sexual exploitation is vacated, and the August 11th, 2008, minute entry, with all other respects, including restitution, is affirmed." The court's resentencing minute entry is consistent with the court's comments at the hearing and again includes an award of restitution in the amount of $13,912.11.

¶4 On appeal from his resentencing, Lane challenges the restitution award, asserting, as he had in the trial court at the initial sentencing and again at the resentencing hearing, that other than the lost wages, the amount awarded is not an economic loss that resulted from the offenses he committed, as required by A.R.S. § 13-603(C). The state contends Lane abandoned and waived the issue by not raising it in his first appeal and takes "no position on the merits of his argument." Lane insists in his opening brief, however, that once we vacated the sentences and remanded the matter to the trial court for resentencing, "it was as if he had never been sentenced," which permitted him to make any arguments regarding any aspect of the new sentences, including restitution, on appeal from the resentencing. He also asserts that "[f]ailure to object to the components

of an award at a restitution hearing waives all but fundamental error" adding, "the imposition of an illegal sentence constitutes fundamental error." We agree.

¶5 In our memorandum decision, we vacated Lane's sentences and remanded for resentencing. *Lane*, No. 2 CA-CR 2008-0283, ¶ 6. The original sentences no longer existed. At his resentencing, he objected to the amount of restitution. Therefore, he has not waived this issue.

¶6 The state, however, relies on our decision in *State v. Hughes*, 8 Ariz. App. 366, 446 P.2d 472 (1968), which our supreme court cited with approval in *State v. Guthrie*, 110 Ariz. 257, 258, 517 P.2d 1253, 1254 (1974), and argues Lane has waived his claim by failing to raise it in his first appeal. In *Guthrie*, our supreme court concluded that because the defendant had failed to argue in his first appeal that his sentence was excessive, he could not raise that issue in a subsequent appeal from the denial of a motion for new trial that had been based on newly discovered evidence. 110 Ariz. at 258, 517 P.2d at 1254. But in the first appeal, the supreme court had affirmed the judgment and sentence. *Guthrie*, 110 Ariz. at 257, 517 P.2d at 1253. The original appellate decision had not vacated the defendant's sentences and remanded for resentencing. *See id.*

¶7 In *Hughes*, we agreed with the state that the defendant could not challenge, in a second appeal, the trial court's denial of a motion to suppress evidence at his first trial, applying the law-of-the-case doctrine stated in *Harbel Oil Co. v. Superior Court*, 86 Ariz. 303, 345 P.2d 427 (1959). 8 Ariz. App. at 368, 446 P.2d at 474. We commented in *Hughes*, "Appeals cannot be taken piecemeal." *Id*. Lane insists that, under *Harbel Oil*, issues that were not addressed by the appellate court do not become the law of the case. For that same proposition in a more recent case, he relies on *State v. Fulminante*, 193 Ariz. 485, 975 P.2d 75 (1999), in which our supreme court stated, "The law of the case

will not be applied if 'the issue was not actually decided in the first decision or the decision is ambiguous.'" 193 Ariz. 485, ¶ 13, 975 P.2d at 81, *quoting Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 483, 720 P.2d 81, 84 (1986). Thus, Lane argues, because we did not address the propriety of the restitution order in our decision on his first appeal, the law-of-the-case doctrine "does not bar consideration of restitution" in this appeal.

¶8 We made the statement in *Hughes* on which the state relies after reaching our conclusion on the merits of the case that the evidence was not admitted improperly. 8 Ariz. App. at 368, 446 P.2d at 474. It, therefore, was dicta. Furthermore, we agree with Lane that the law-of-the-case doctrine does not preclude our review of the restitution order entered after resentencing because we did not consider, in his first appeal, the propriety of the court's previous, identical order. *Cf. Harbel Oil*, 86 Ariz. at 306-08, 345 P.2d at 429-30 (trial court had jurisdiction over issues not delimited by appellate mandate; errors in exercise of jurisdiction "can be corrected on appeal").

¶9 Even assuming, as the state suggests, a defendant is deemed to have waived an issue that could have been raised, but was not, in an initial appeal, we would grant Lane relief in any event because, as discussed below, the restitution order amounts to fundamental, prejudicial error. *Cf. State v. Henderson*, 210 Ariz. 561, 567-69, ¶¶ 19-26, 115 P.3d 601, 607-09 (2005) (failure to object in trial court waives all but fundamental, prejudicial error). An improper restitution order results in a sentence that can be characterized as illegal, and an illegal sentence is both fundamental error and prejudicial. *See State v. Whitney*, 151 Ariz. 113, 115, 726 P.2d 210, 212 (App. 1985) (order requiring restitution to one not victim of crime constituted illegal sentence that "can be reversed on appeal despite the lack of an objection"). Given that an appellate court has the discretion

to correct fundamental error we "stumble across," *State v. Mann*, 188 Ariz. 220, 232 n.1, 934 P.2d 784, 796 n.1 (1997) (Martone, J., concurring), surely we have the discretion to correct such an error when, as here, the defendant objected twice in the trial court but neglected to raise it in an initial appeal. Accordingly, we consider the issue on its merits.[1]

¶10 We agree with Lane that the portion of the restitution order compensating the victim for the loss of her property was improper. A trial court is required to order a defendant to pay restitution to victims of the defendant's crime "in the full amount of the economic loss as determined by the court." § 13-603(C); *see also* A.R.S. § 13-804(A). To qualify for restitution, a "loss must be economic" and it "must be one that the victim would not have incurred but for the defendant's criminal offense"; the loss must "flow directly from the defendant's criminal conduct, without the intervention of additional causative factors." *State v. Wilkinson*, 202 Ariz. 27, ¶ 7, 39 P.3d 1131, 1133 (2002). Section 13-105(16), A.R.S., defines economic loss as "any loss incurred by a person as a result of the commission of an offense" and specifically excludes "consequential damages." Here, the court awarded the victim restitution for property that had belonged to her and that Lane allegedly had sold or otherwise disposed of after he was arrested and his house was sold. Although arguably this loss was a consequence of Lane's criminal conduct, it was not a direct result of the offenses of which he was convicted. *See State v. French*, 166 Ariz. 247, 248, 249, 801 P.2d 482, 483, 484 (App. 1990) (damage suffered

[1]In contrast, in the context of post-conviction proceedings under Rule 32, Ariz. R. Crim. P., a defendant's claim that his sentence is illegal is not exempt from the preclusive effect of Rule 32.2(a), Ariz. R. Crim. P. *See State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (claims of illegal sentence subject to rule of preclusion in Rule 32.2); *State v. Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d 945, 958 (App. 2007) (fundamental error not excepted from rule of preclusion). But there is no similar rule of preclusion, other than the law-of-the-case doctrine, with respect to an appeal.

by hotel owner for cleaning expenses, replacement bedding, and lost rental income not economic loss resulting from sexual abuse and assault of victim).

¶11 We need not address the propriety of the portion of the restitution order that compensated the victim for her loss of earnings because Lane concedes it was lawful. *See* § 13-105(16) (restitution can include lost earnings); *see also State v. Madrid*, 207 Ariz. 296, ¶¶ 10-13, 85 P.3d 1054, 1058 (App. 2004) (economic loss includes reasonable travel-related expenses incurred by deceased victim's immediate family to attend court proceedings); *State v. Lindsley*, 191 Ariz. 195, 198-99, 953 P.2d 1248, 1251-52 (App. 1997) (lost earnings for voluntary attendance at trial recoverable restitution rather than non-recoverable consequential damages).

¶12 We therefore modify the restitution award to reflect total restitution in the amount of $488.30, to compensate the victim for her lost wages. In all other respects, the sentences are affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge